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# In the Supreme Court of the United States

OCTOBER TERM, 1974

PAUL KERN IMBLER, PETITIONER

*v.*

RICHARD PACHTMAN

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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# In the Supreme Court of the United States

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No. 74-5435

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

### QUESTION PRESENTED

The United States will discuss the following question:

Whether prosecutors are immune from civil liability for damages for acts done as part of their official duties.

### INTEREST OF THE UNITED STATES

This is an action for damages under the Civil Rights Act (42 U.S.C. 1983) against a state prosecuting attorney, based on the claim that the prosecutor knowingly used perjured testimony to convict the plaintiff of murder. The court of appeals affirmed the district court's dismissal of the complaint, ruling that the prosecutor had absolute immunity from civil

liability for acts done in the performance of his official duties.

Although federal law governs the immunity of federal prosecutors (cf. *Howard* v. *Lyons*, 360 U.S. 593, 597), the Court's decision on the scope of the common-law immunity of a state prosecutor is likely to have a significant impact upon, and perhaps may control, the immunity of federal prosecutors. The United States thus has a substantial interest in the resolution of the immunity issue. For the reasons discussed below, we believe that the prosecutor has absolute immunity for acts done as part of the performance of his duties.[1]

**STATEMENT**

This suit for damages grows out of petitioner's 1961 conviction in the California courts of first-degree murder and assault with a deadly weapon with intent to commit murder. The Supreme Court of California twice upheld petitioner's conviction, but the federal courts then set aside the conviction in a *habeas corpus* proceeding, ruling that the conviction had been obtained through the use of perjured testimony. The petitioner then brought the present suit for damages in the United States District Court for the Central District of California, against respondent Pachtman, the Deputy District Attorney who had prosecuted the

[1] The present suit for damages is brought under 42 U.S.C. 1983. Since that provision, "at least facially", is inapplicable to federal officials (see *District of Columbia* v. *Carter*, 409 U.S. 418, 424–425), we do not discuss the additional question whether, if the prosecutor has such immunity, Congress modified or eliminated it in Section 1983. Cf. *Pierson* v. *Ray*, 386 U.S. 547, 554.



criminal case in the state court. The district court dismissed the complaint and a divided court of appeals affirmed, ruling that respondent was immune from liability for damages for acts done as part of his official duties as a prosecuting attorney.

1. *The murder conviction.* The evidence in the state prosecution[2] shows that on the evening of January 4, 1961, two men entered a Los Angeles grocery store and one of them shot and killed the owner. The victim's wife could not identify the murderer, but identified the other man, who was killed 10 days after the shooting during an armed robbery in which he accompanied petitioner. The victim's wife, however, identified the hat and coat the murderer wore. The coat, which contained the murder weapon and a razor and case, was found in an alley near the store where, according to the witness Costello, petitioner had dropped it after Costello chased petitioner.

Three witnesses identified petitioner. Costello, who was walking on the opposite side of the street, crossed the street when he heard a shot and saw petitioner, who was still wearing his hat and coat and carrying a gun, in a lighted area in front of the store. Costello stated that petitioner turned into an alley, dropped his hat, began to run and that Costello chased him. When petitioner paused, Costello could see him without his hat at a distance of between 15 and 20 feet. Petitioner fired at Costello, discarded his coat and fled through a parking lot. Costello retrieved the coat.

[2] The evidence is summarized in the opinions of the Supreme Court of California upholding petitioner's conviction (App. 8–16).

Alonzo Dunlap, an attendant at the parking lot, testified that he got a side and front view of petitioner as he walked through the illuminated lot. Billy Hillen saw petitioner and the other man enter the store as he was leaving it, and, after he heard the shot, he saw the two men leaving the store with petitioner holding a gun.[3]

Petitioner's defense was an alibi; he also extensively cross-examined the prosecution's witnesses.

On direct appeal, the Supreme Court of California, in an opinion by Justice Traynor, unanimously upheld the conviction. *People* v. *Imbler,* 57 Cal. 2d 711, 21 Cal. Rptr. 568, 371 P. 2d 304 (App. 8–14). Subsequently, petitioner sought in the Supreme Court of California a reopening of his case, alleging that "the prosecution secured petitioner's conviction through the knowing use of perjured testimony and that newly discovered evidence completely undermines the entire structure of the case on which the prosecution was based" (App. 15–16). After an evidentiary hearing conducted by Thomas P. White, a retired Associate Justice of that court acting as a referee, the Supreme Court of California, in a lengthy opinion by Justice Traynor, again unanimously upheld petitioner's conviction (App. 14–29).

The court held that most of petitioner's allegations that Costello had testified falsely had not been established (App. 16–21); that there was no showing that

[3] A fourth person, James Fritz, stood near Hillen when the latter saw the two men leave the store. Fritz, however, did not testify and the police apparently were unable to locate him at the time of trial (App. 25).



representatives of the state were aware of the falsity of statements by Costello concerning his college degrees (App. 21–22); that the fingerprint expert had not knowingly testified falsely and that, if the expert had acted negligently in analyzing the fingerprints on the razor case and testifying about them, such negligence did not deny petitioner a fair trial (App. 23–25). The court also rejected petitioner's contention that the state had suppressed evidence favorable to him (App. 25–26). Finally, it ruled that the new evidence upon which petitioner relied did not warrant a new trial (App. 26–28).

2. *The habeas corpus proceeding.* Following further state proceedings which resulted in vacation of petitioner's death sentence and a resentencing to life imprisonment (App. 31), petitioner instituted a *habeas corpus* proceeding in the United States District Court. That action raised the same contentions concerning allegedly false testimony and new evidence that the Supreme Court of California had rejected (App. 30–32). For that reason, the district court did not conduct a further hearing but decided the issue upon the record before the California courts, including the trial record and the record before Justice White (App. 32). The district court issued the writ, holding that "petitioner was denied a fair trial, and that his federally protected right to due process of law was thereby violated" (App. 60).

The court held that Costello had testified falsely at petitioner's trial with respect to six matters (App. 42–43); that, "as to each of the six items of false testimony described above, the court finds that the

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prosecutor had knowledge of such falsity, or, if he did not have actual knowledge, that he had reason to believe such testimony was false and his reckless use thereof in disregard of such reason is to be treated the same as knowing use of false testimony" (App. 53); and that fingerprint evidence and evidence relating to the overcoat worn by the killer was suppressed (App. 54–58). The court of appeals affirmed *per curiam*. *Imbler* v. *State of California*, 424 F. 2d 631 (C.A. 9), certiorari denied, 400 U.S. 865.

3. *The present suit for damages.* After the district court's decision setting aside his conviction, petitioner instituted this suit against respondent and others.[4] The complaint alleged that Pachtman and others had

> acted individually and at other times collectively and conspiratorially * * * and by their acts of malfeasance, misfeasance, nonfeasance, negligence, and failure to inform and convict while under a duty to do so, planned and individually and/or collectively acted in concert to deprive plaintiff of his liberty by unlawfully charging him with murder and assault with intent to commit murder, and convicting him of the foregoing * * *. [App. 61–62.]

It further alleged that Pachtman, "a duly acting and appointed deputy district attorney of Los Angeles,"

> performed acts of malfeasance, misfeasance, failure to inform and correct, knowingly used

[4] The other defendants were members of the Los Angeles Police Department who were alleged to have conspired with Pachtman to violate petitioner's civil rights. The judgment of dismissal which is the subject of this petition was entered only as to Pachtman.



> testimony at the said trial via witnesses he produced for the people, wherein said testimony, or some of it, was perjured, and the said RICHARD PACHTMAN knew of the perjured nature of said testimony and failed to correct and halt the same from being utilized to convict this plaintiff [App. 63–64].

The complaint sought exemplary damages of $1,200,000.00 and actual damages of $1,500,000.00 (App. 80).

The district court dismissed the complaint against Pachtman (App. 104–112). It held that Pachtman was covered by the immunity from civil liability that prosecutors have "for acts done as part of their traditional official functions" (App. 107; see App. 110).

The court of appeals (one judge dissenting) affirmed (App. 116–120, 121–125). It held that "[t]he acts of the defendant which allegedly harmed appellant occurred during prosecutorial activities which can only be characterized as an 'integral part of the judicial process'" (App. 116). It observed that "[t]he protection given a prosecutor acting in his quasi-judicial role protects not simply the prosecutor, but, more importantly, the effective operation of the judicial process, and hence the 'common good'" (App. 118–199).

## SUMMARY OF ARGUMENT

1. Prosecutors, as quasi-judicial officers, have the same absolute immunity from tort liability for acts done as part of their official duties that judges and jurors have. This Court has consistently held that judges are immune from civil liability for damages

for acts done within the general scope of their jurisdiction even if it is claimed that the act was done maliciously. Similarly this Court and the courts of appeals have held, by analogy to cases concerning judges, that prosecutors have the same absolute immunity.

This Court's recent decisions in *Scheuer* v. *Rhodes,* 416 U.S. 232, and *Wood* v. *Strickland,* No. 73–1285, decided February 25, 1975, are consistent with this analysis. In providing only a qualified immunity for some state executive officials (*Scheuer*) and school officials (*Wood*), the Court discussed with apparent approval its prior holdings granting absolute immunity to judicial officials.

2. Absolute immunity for prosecutors is necessary for the proper performance of their duties. Prosecutors would be reluctant to prosecute close and difficult cases if they knew that should the prosecution fail they would be subject to a suit for damages in which they would have to disprove charges that they had acted maliciously or in bad faith. A qualified immunity would not adequately insure the uninhibited performance of prosecutorial functions that is necessary for proper criminal law enforcement.

3. There are remedies other than damage suits that provide adequate protection against prosecutorial misconduct. The built-in systems of review in the criminal system assure against most misconduct. In addition, prosecutors who seriously overstep the bounds of professional conduct are subject to disciplinary proceedings, and, if the prosecutor's misconduct is itself a crime, he is subject to criminal prosecution.



## ARGUMENT

### PROSECUTORS, AS QUASI-JUDICIAL OFFICERS, HAVE THE SAME ABSOLUTE IMMUNITY FROM LIABILITY FOR DAMAGES FOR ACTS DONE AS PART OF THEIR OFFICIAL DUTIES THAT JUDGES AND JURORS HAVE

#### A. JUDGES AND JURORS ARE IMMUNE FROM CIVIL LIABILITY FOR ACTS PERFORMED WITHIN THE SCOPE OF THEIR OFFICIAL DUTIES, REGARDLESS OF ALLEGATIONS OF MALICE

1. Judges have long been accorded an absolute immunity from civil liability for acts done in the performance of their official duties. See, *e.g.,* the discussion in *Spalding* v. *Vilas,* 161 U.S. 483, 493–495. The tradition of protecting judges from such vexatious litigation stems from English precedent and has deep roots within American jurisprudence. As early as 1810, in *Yates* v. *Lansing,* 4 Johns Rep. 282, 15 N.Y. Common Law Rep., a judge was held immune from civil liability based on the claim that he had wrongfully imposed a prison sentence upon the plaintiff, who had previously been discharged on a writ of *habeas corpus* by another judge.

More than a hundred years ago this Court in *Bradley* v. *Fisher,* 13 Wall. 335, held that judges have an absolute immunity for acts done as part of their official duties. In that case, an attorney sued a District of Columbia judge for damages allegedly sustained "by reason of the [judge's] wilful, malicious, oppressive, and tyrannical acts and conduct" in disbarring the attorney (*id.* at 336). This Court held that the suit would not lie, because "judges of courts of superior or general jurisdiction are not liable to civil actions

for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly" (*id.* at 351).

The Court stated (*ibid.*) that a judge was not liable even where he acted in "excess of jurisdiction" but only where there was a "clear absence of all jurisdiction over the subject-matter." The Court added (13 Wall. at 354) that the immunity

> * * * cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. * * * But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed.

The Court reaffirmed these principles in *Pierson* v. *Ray*, 386 U.S. 547. In holding that a municipal police judge is not liable for damages in a suit under Section 1983 for having convicted the plaintiffs under a statute subsequently held unconstitutional, this Court observed (*id.* at 553–554):

> Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley* v. *Fisher*, 13 Wall. 335 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." * * * His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.



2. Similarly, members of grand juries and petit juries have been accorded an absolute immunity from civil liability for damages sought on the basis of their participation in the judicial process as jurors. For example, the Indiana Supreme Court in *Hunter* v. *Mathis*, 40 Ind. 356, held that the plaintiff could not maintain a suit against a grand juror alleging that the latter, maliciously and without probable cause, had procured his indictment, which was quashed. The court stated (*id.* at 358):

> Few persons would be willing to act as grand jurors, if, upon the testimony of their fellows or others * * * they would be liable to be subjected to an action and to the payment of damages. * * * Let it be conceded that grand jurors are sometimes influenced by improper motives, which it is believed is not often the case, and still the evils which would result from any other rule would be far more frequent and pernicious than those resulting from this.

See, also, *Sidener* v. *Russell,* 34 Ill. App. 446; *White* v. *Hegerhorst,* 418 F. 2d 894 (C.A. 9), certiorari denied, 398 U.S. 912; *Roberts* v. *Barbosa,* 227 F. Supp. 20 (S.D. Cal.). Cf. *Phelps* v. *Dawson,* 97 F. 2d 339, 340 (C.A. 8); *Cooper* v. *O'Connor,* 99 F. 2d 135, 141 (C.A.D.C.), certiorari denied, 305 U.S. 643; *Yaselli* v. *Goff,* 12 F. 2d 396, 404 (C.A. 2), affirmed *per curiam,* 275 U.S. 503.

### B. PROSECUTORS DO AND SHOULD HAVE THE SAME ABSOLUTE IMMUNITY AS JUDGES AND JURORS

1. This Court has ruled that prosecutors have the same absolute immunity from liability for damages for acts done in the performance of their official duties as judges have. *Yaselli* v. *Goff,* 275 U.S. 503, affirming 12 F. 2d 396 (C.A. 2).

In that case Yaselli sued Goff, a Special Assistant to the Attorney General of the United States, for malicious prosecution growing out of Yaselli's indictment, trial and acquittal on charges of conspiring to defraud the United States. Yaselli alleged that Goff had maliciously, falsely and illegally induced the grand jury to indict him (12 F. 2d at 397–398); that upon the trial the court had directed a verdict of acquittal (*id.* at 398); and, in response to Goff's defense that everything he had done had been "in the due performance of his duties as such special assistant" (*ibid.*), that Goff's appointment to that position was itself a step in furtherance of the conspiracy "to prosecute the plaintiff maliciously and without cause" (*ibid.*). In affirming a dismissal of the complaint, the court of appeals, after first discussing the absolute



immunity of judges, jurors and attorneys in presenting cases to a court (*id.* at 399–404), stated (*id.* at 404):

> A United States attorney, if not a judicial officer, is at least a quasi judicial officer, of the government. He exercises important judicial functions, and is engaged in the enforcement of the law. The reasons for granting immunity to judges, jurors, attorneys, and executive officers of the government apply to a public prosecutor in the performance of the duties which rest upon him.

The court ruled (*id.* at 406):

> In our opinion the law requires us to hold that a special assistant to the Attorney General of the United States, in the performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution based on an indictment and prosecution, although it results in a verdict of not guilty rendered by a jury. The immunity is absolute, and is grounded on principles of public policy. The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions. They should be no more liable to private suits for what they say and do in the discharge of their duties than are the judges and jurors, to say nothing of the witnesses who testify in a case.

Finally, the court held that Yaselli's claim that Goff had "conspire[d] willfully and maliciously to get himself appointed as prosecutor, in order that he may

willfully and maliciously indict and prosecute the person he seeks to punish" did not destroy the immunity (*id.* at 407):

> In our opinion, the reasons which compel us to hold that one who obtains an appointment as a prosecuting officer of the government is immune from civil liability for acts done by him in the discharge of his official duties apply in like manner to protect him against such a charge as that he was governed by improper motives in securing the appointment. The important fact is that he was appointed to the office, and, having been appointed, the public interests require that he shall be free and fearless to act in the discharge of his official duties. If he cannot be charged with acting willfully and maliciously after he gets appointed to the office, no more can he be charged with having conspired to get into the office in order to act willfully and maliciously after he gets his appointment. The one charge is as much to be feared as the other, and is equally derogatory to his public character and usefulness in the office. [Ibid.]

After hearing oral argument, this Court affirmed, *per curiam* (275 U.S. 503), "on the authority of" *Bradley* v. *Fisher, supra,* and *Alzua* v. *Johnson,* 231 U.S. 106, in which the absolute immunity of judges was applied to a judge of the Supreme Court of the Philippine Islands.

This Court's affirmance in *Yaselli* "on the authority of" those cases was a ruling that the absolute immunity recognized in those cases for judges applies equally to a prosecutor. See *Barr* v. *Matteo,* 360 U.S.





564, 569. The court of appeals had held that prosecutors, like judges and jurors, have an absolute immunity "for what they say and do in the discharge of their duties" (12 F. 2d at 406). This Court's *per curiam* affirmance was a recognition that, in light of *Bradley* and *Alzua,* the absolute immunity of prosecutors was so clear as not to require any extended analysis or discussion.

The complaint in the present case does not allege a conspiracy by respondent Pachtman maliciously and unlawfully to prosecute petitioner, but the alleged use of perjured testimony to convict him. That distinction, however, provides no basis for distinguishing *Yaselli.* The ruling in that case was that a prosecutor has an absolute immunity for acts done in the performance of his prosecutorial functions and that the immunity cannot be destroyed by allegations that in performing that duty he acted maliciously or illegally. The particular form that such alleged improper performance of his duty takes is immaterial.

As petitioner recognized (App. 63), in prosecuting him respondent Pachtman was performing his duty as the deputy district attorney of Los Angeles. Since all the acts upon which petitioner's complaint is based were within the scope of respondent's authority as a prosecutor because they were part of the trial of the case that respondent was presenting, under *Yaselli* respondent is absolutely immune from liability for damages based upon those acts.

2. In light of the foregoing authorities and the policy considerations discussed below, it is hardly surprising that eight circuits have recognized that

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prosecutors have absolute immunity for acts done in the performance of their official functions.[5]

[5] *District of Columbia Circuit*

*Cooper* v. *O'Connor*, 99 F. 2d 135, certiorari denied, 305 U.S. 643 (claim that the United States Attorney maliciously and without probable cause sought and secured an indictment against plaintiff).

*Laughlin* v. *Garnett*, 138 F. 2d 931, certiorari denied, 322 U.S. 738 (claim that the United States Attorney instituted prosecution on criminal charges known to be false and prepared forged documents for use against plaintiff).

*Laughlin* v. *Rosenman*, 163 F. 2d 838 (claim that United States Attorney General and special assistant utilized false testimony in order to indict petitioner, who was later acquitted).

*Second Circuit*

*Gregoire* v. *Biddle*, 177 F. 2d 579, certiorari denied, 339 U.S. 949 (claim that two successive United States Attorneys General knowingly falsely imprisoned plaintiff as a suspected enemy alien).

*Fanale* v. *Sheehy*, 385 F. 2d 866 (claim that State prosecutor violated plaintiff's civil rights by maliciously prosecuting, suborning perjury, and signing false documents).

*Third Circuit*

*Kauffman* v. *Moss*, 420 F. 2d 1270, certiorari denied, 400 U.S. 846 (claim that State prosecutor violated plaintiff's civil rights by knowingly using false testimony to convict him).

*Moore* v. *Buck*, 443 F. 2d 25 (claim that State prosecutor caused denial of plaintiff's right to a speedy trial and improperly placed a detainer on him).

*Bethea* v. *Reid*, 445 F. 2d 1163, certiorari denied, 404 U.S. 1061 (claim that United States Attorney maliciously prosecuted plaintiff and suborned perjury).

*Cambist Films, Inc.* v. *Duggan*, 475 F. 2d 887 (claim against State prosecutor who supervised the seizure of films later determined not to be obscene).

*Fifth Circuit*

*Carmack* v. *Gibson*, 363 F. 2d 862 (claim that State prosecutor picked and struck jurors unlawfully, in violation of plaintiff's civil rights).



A number of those cases involve claims, similar to those made here, that the prosecutor knowingly used

*Guedry* v. *Ford*, 431 F. 2d 660 (claim that State prosecutor and judge maliciously conspired to convict plaintiff in violation of his civil rights).

*Williams* v. *Weinberger*, 494 F. 2d 1191 (claim that State prosecutor denied plaintiff access to police reports and further impaired plaintiff's ability to prepare his defense by causing him to be jailed).

*Seventh Circuit*

*Cawley* v. *Warren*, 216 F. 2d 74 (claim that State prosecutor and grand jury foreman knowingly procured indictment without probable cause, in violation of federal civil rights laws).

*Jennings* v. *Nester*, 217 F. 2d 153, certiorari denied, 349 U.S. 958 (claim that State prosecutor and police knowingly perpetrated illegal search and seizure and subornation of perjury in violation of plaintiff's civil rights).

*Peckham* v. *Scanlon*, 241 F. 2d 761 (claim that State prosecutor and others purposely and maliciously impeded plaintiff's attempts to secure collateral review through state habeas corpus proceedings in violation of his civil rights).

*Kalec* v. *Adamowski*, 406 F. 2d 536 (claim that State prosecutor knowingly used false testimony, in violation of federal civil rights laws).

*Berg* v. *Cwiklinski*, 416 F. 2d 929 (claim under federal civil rights laws that judge and local prosecuting attorney illegally convicted plaintiff of contempt when he refused to answer questions propounded to him during his own trial, in violation of his Fifth Amendment privilege against self-incrimination).

*Eighth Circuit*

*Barnes* v. *Dorsey*, 480 F. 2d 1057 (claim that State prosecutor knowingly suppressed exculpatory evidence in violation of plaintiff's civil rights).

*Duba* v. *McIntyre*, 501 F. 2d 590 (claim under federal civil rights laws that local district attorney maliciously swore out arrest warrant and attached plaintiff's property for failure to pay a fine).

*Ninth Circuit*

*Sires* v. *Cole*, 320 F. 2d 877 (claim under federal civil rights laws that State prosecutor participated in imposing felony sentence upon plaintiff for misdemeanor).

*Harmon* v. *Superior Court of State of California*, 329 F. 2d 154 (claim against State prosecutor for alleged violation of civil rights through prosecution of plaintiff for failing to support his family).

*Agnew* v. *Moody*, 330 F. 2d 868 (claim against State prosecutor under federal civil rights laws based upon defendant's prosecution of plaintiff for vehicular violation).

*Tenth Circuit*

*Kostal* v. *Stoner*, 292 F. 2d 492, certiorari denied, 369 U.S. 868 (claim that local prosecutor suborned perjury and suppressed exculpatory evidence in violation of federal civil rights laws).

Although the First and Fourth Circuits have not directly ruled on the issue, decisions in those circuits are not to the contrary.

*First Circuit*

*Rudnicki* v. *McCormack*, 210 F. Supp. 905 (D. Mass. and R.I.) (claim that State and federal prosecutors denied plaintiff's civil rights by defending judges' actions in appellate courts).

*Guerro* v. *Mulhearn*, 498 F. 2d 1249 (holding that a prosecutor has only a qualified immunity in his investigatory activity, without ruling on the degree of immunity for his immediate prosecutorial functions).

*Fourth Circuit*

*Weathers* v. *Ebert*, 305 F. 2d 514 (claim that State district attorney deprived plaintiff of his civil rights by indicting and prosecuting plaintiff for offense upon which he had already been acquitted; claim dismissed on pleadings without reaching question of absolute immunity).

*Phillips* v. *Singletary*, 350 F. Supp. 297 (D. S.C.) (claim that State prosecutor participated in conspiracy to deprive plaintiff, convicted for rape, of his civil rights).

*McCray* v. *State of Maryland*, 456 F. 2d 1 (acknowledged in dicta the absolute immunity of judges and prosecutors while granting a court clerk only a qualified immunity for a ministerial act).



false evidence[6] or suppressed evidence favorable to the defendant.[7]

Three of the circuits (the Fifth, Seventh and Ninth) distinguish between a prosecutor's acts which are part of his immediate prosecutorial functions (such as obtaining witnesses and presenting evidence), for which his immunity is absolute, and his purely investigative functions (such as planning or participating in a search or seizure), for which there is only a qualified immunity, *i.e.*, the acts are not immune if

The Sixth Circuit has also recognized the prosecutor's absolute immunity: .

*Kenney* v. *Fox*, 232 F. 2d 288, certiorari denied, 352 U.S. 855 (claim that State prosecutor had participated in known false arrest and malicious prosecution in violation of plaintiff's civil rights).

*Thompson* v. *Heither*, 235 F. 2d 176 (claim of false arrest and malicious prosecution against local prosecutor based upon federal civil rights laws).

*Hurlburt* v. *Graham*, 323 F. 2d 723 (claim that State prosecutor knowingly used false testimony in prosecution of plaintiff in violation of his civil rights).

*Gabbard* v. *Rose*, 359 F. 2d 182 (claim that State prosecutor tried and convicted plaintiff under the wrong statute, in violation of federal civil rights laws).

But by analogy to acts outside the prosecutorial function (and without citation to its prior decisions), the Court of Appeals for the Sixth Circuit recently permitted a suit for monetary damages against a State prosecutor for alleged introduction of known false or misleading evidence. *Hilliard* v. *Williams*, 465 F. 2d 1212, certiorari denied, 409 U.S. 1029.

[6] *Laughlin* v. *Garnett*, *supra*; *Laughlin* v. *Rosenman*, *supra*; *Fanale* v. *Sheehy*, *supra*; *Kauffman* v. *Moss*, *supra*; *Bethea* v. *Reid*, *supra*; *Hurlburt* v. *Graham*, *supra*; *Jennings* v. *Nester*, *supra*; *Kalec* v. *Adamowski*, *supra*. But see *Hilliard* v. *Williams*, *supra*.

[7] *Kostal* v. *Stoner*, *supra*.

done maliciously.[8] We think this distinction is unsound, since investigatory work may be an integral and important part of the prosecutor's functions. There is no need to reach that question here, however, since in this case the gravamen of petitioner's complaint is the prosecutor's alleged misconduct in the trial of the case.

In any event, neither the Fifth nor the Ninth Circuits has held, as petitioner suggests (Pet. Br. 34–36), that a prosecutor's "bad faith" destroys the absolute immunity he has for acts done as part of his direct prosecutorial functions. As the court below noted, "[t]he purported distinction [between acts in good

[8] The following acts have been held directly related to prosecutorial duties and thus covered by absolute immunity: (1) alleged use of altered tapes of confession at preliminary hearing (*Ney* v. *State of California*, 439 F. 2d 1285 (C.A. 9)); (2) claimed subornation of perjury (*Marlowe* v. *Coakley*, 404 F. 2d 70 (C.A. 9), certiorari denied, 395 U.S. 947); (3) alleged malicious institution of criminal charges (*Guedry* v. *Ford*, 431 F. 2d 660 (C.A. 5)); (4) claimed use of illegal methods of picking and striking jurors from *voir dire* panel (*Carmack* v. *Gibson*, 363 F. 2d 862 (C.A. 5)); (5) claimed intentional delay in dropping charges after exculpatory evidence discovered (*Tyler* v. *Witkowski*, 511 F. 2d 449 (C.A. 7)); (6) prosecutor's conditioning dismissal of charge on defendant's agreement not to sue for damages (*Boyd* v. *Adams*, 513 F. 2d 83 (C.A. 7)).

The following acts have been considered investigatorial and thus not absolutely immune: (1) planning an allegedly illegal search (*Hampton* v. *City of Chicago*, 484 F. 2d 602 (C.A. 7), certiorari denied, 415 U.S. 917; *Guerro* v. *Mulhearn*, 498 F. 2d 1249 (C.A. 1)); (2) ordering deputies to coerce a guilty plea (*Lewis* v. *Brautigam*, 227 F. 2d 124 (C.A. 5)); (3) allegedly keeping potential defendant incarcerated without benefit of appearance before magistrate (*Robichaud* v. *Ronan*, 351 F. 2d 533 (C.A. 9)); (4) claimed supervision of false arrests (*Madison* v. *Purdy*, 410 F. 2d 99 (C.A. 5)).



faith and in bad faith] undermines the purpose of the absolute immunity previously recognized, because the addition * * * of an easy to make but difficult to prove charge of knowing and malicious prosecutorial misconduct to any complaint would suffice to require a full trial on the merits of the prosecutor's conduct while acting as a judicial officer" (App. 117–118, n. 2). See, also, *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (C.A. 2), certiorari denied, 339 U.S. 949; *Bradley* v. *Fisher*, quoted, *supra*, at p. 10.

3. This Court's recent decisions in *Scheuer* v. *Rhodes*, 416 U.S. 232, and *Wood* v. *Strickland*, No. 73–1285, decided February 25, 1975, are consistent with this analysis. There the Court held that in damage suits under Section 1983, state executive officials (*Scheuer*) and school officials (*Wood*) had only a qualified immunity for acts done in performance of their official duties, *i.e.*, they were immune only as long as they acted in good faith and not maliciously. Cf. *O'Connor* v. *Donaldson*, No. 74–8, decided June 26, 1975, slip. op., p. 13.

The Court in *Scheuer* discussed with apparent approval its prior ruling in *Pierson* v. *Ray*, *supra*, that in Section 1983 Congress had not "intended to abolish the common-law 'immunity of judges for acts within the judicial role'" (416 U.S. at 244). Similarly, in *Wood*, the Court pointed out that in *Pierson* "we concluded that the common-law doctrine of absolute judicial immunity survived" the enactment of Section 1983 (slip op. at 9). Since, as we have shown, the absolute immunity of prosecutors derives from and is analogous to that of judges, the fact that in

*Scheuer* and *Wood* executive officials were given only the narrower qualified immunity does not call for a similar narrowing of the absolute immunity prosecutors traditionally have had.

In *Wood,* the Court concluded (slip op. at 12) that the "judgment implicit in" "the development by state courts of a qualified immunity protecting school officials from liability for damages in lawsuits claiming improper suspensions or expulsions * * * is that absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." As we now show, an absolute immunity not only substantially "increase[s] the ability of [prosecutors] * * * to exercise their discretion in a forthright manner," but is necessary to accomplish that objective.

### C. ABSOLUTE IMMUNITY FOR PROSECUTORS IS NECESSARY FOR THE PROPER PERFORMANCE OF THEIR FUNCTIONS

1. The policy upon which absolute immunity for government officials for acts done in the performance of their official functions is based was forcefully set forth by Judge Learned Hand speaking for the court in the leading case of *Gregoire* v. *Biddle,* 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries



> he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. [177 F. 2d at 581.]

See, also, the statements from *Bradley* v. *Fisher* and *Pierson* v. *Ray,* quoted, *supra,* at pp. 10–11.

These considerations are particularly significant for prosecuting attorneys. Prosecutors constantly make difficult and close decisions on a large number of sensitive issues. These include such questions as whether to present a case to the grand jury, whether

to prosecute a case at trial, whether to dismiss an indictment against particular defendants, whether to call witnesses whose character is dubious and whether to present certain evidence. Frequently a prosecutor may decide—particularly where there is a sharp conflict in the evidence—that it is appropriate to permit the jury to resolve the question and he therefore goes ahead with a prosecution with full awareness that the jury may find the defendant's evidence convincing and acquit him.

In such cases there is a strong public interest in a thorough airing of the facts in a public trial, to enable an impartial jury to decide the question of guilt or innocence. The conflict in the evidence, however, may make a prosecutor particularly susceptible to being charged with acting in bad faith if the jury refuses to convict. Many prosecutors would be reluctant to go forward in such a case if they knew that, should the jury acquit, they would then be forced to defend before a jury the good faith of their actions against the charge that they acted maliciously or arbitrarily. A defendant in a criminal case is likely to bring such a suit since he tends to view the prosecutor as his enemy, the man responsible for his predicament. The result would be that the public interest in proper enforcement of the criminal laws would be jeopardized because of prosecutors' unwillingness to present close cases where there was a significant likelihood of acquittal.

If the judge directs a verdict or the jury acquits the defendant, it is but a short step for the defendant



to conclude that he has been the victim of a vendetta conducted by the prosecutor in which his enemy has engaged maliciously in all kinds of illegal conduct. As the Court pointed out in *Bradley* v. *Fisher, supra,* the criminal courts determine "[c]ontroversies involving * * * the liberty and character of the parties" which "consequently excit[e] the deepest feeling," and in which

> the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge. [13 Wall. at 348.]

This reasoning is equally applicable to the prosecutor, whom the defendant is equally, or perhaps more, likely to blame for his situation.

A qualified rather than an absolute immunity would not be adequate to insure the vigorous and fearless performance of the prosecutor's duties that is necessary to the proper functioning of the criminal justice system. Such an immunity is lost if the prosecutor has acted maliciously or perhaps unreasonably—the exact contours of and standards for the qualified immunity are uncertain. Charges that the prosecutor acted improperly are easy to make. Often "it is impossible to know whether the claim is well founded

until the case has been tried'' (*Gregoire* v. *Biddle, supra,* 339 U.S. at 949), or to be certain that the jury will vindicate the prosecutor's actions in initiating or conducting a particular criminal case.

Once the elements of malice or arbitrariness become the touchstone for determining the prosecutor's liability for damages, it "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties" (*ibid.*), to know that their possible liability for damages would depend upon a jury's subsequent evaluation of their motives and good faith in conducting the prosecution. Only an absolute immunity, in which the sole inquiry is whether the prosecutor's actions were taken in the performance of his official duties, will suffice to avoid the dangers to the public interest that the immunity doctrine is designed to prevent.[9]

The present case dramatically illustrates the dangers for effective law enforcement that a qualified immunity standard would create. The seven Justices of the Supreme Court of California all agreed, upon the basis of an extensive evidentiary hearing, that most of petitioner's allegations that the principal government witness had testified falsely had not been

[9] Moreover, because a prosecutor's good faith is the issue under the qualified immunity standard, that standard often would require prosecutors to engage in protracted litigation, frequently involving extensive discovery, which would divert them from their primary task. See *Barr* v. *Matteo*, 360 U.S. 564, 571. But because the issue presented under the absolute immunity rule is the narrower one of whether the prosecutor has acted in the performance of his official duties, cases under that rule—and particularly the many that are lacking in merit—can be disposed of more expeditiously.



established, that the state's representatives were unaware of the single statement of that witness found to be false, that the fingerprint expert had not knowingly testified falsely, and that if he had acted negligently, that negligence did not deny petitioner a fair trial (*supra,* pp. 4–5). On the same record, however, four federal judges concluded that the same witness had testified falsely with respect to six items (App. 42–43) and that to each of those items "the prosecutor had knowledge of such falsity, or, if he did not have actual knowledge, that he had reason to believe such testimony was false and his reckless use thereof in disregard of such reason is to be treated the same as knowing use of false testimony'' (App. 53).

In the light of this sharp disagreement among the judges over what the record establishes, it is impossible to predict how a jury would react if it were required to determine whether respondent Pachtman had acted maliciously or arbitrarily in trying the case against petitioner. Yet the case involved a callous murder, and there was a strong public interest in bringing the guilty person to trial. Moreover, the evidence against petitioner was strong. Several eye-witnesses identified him as the man wearing a coat and hat who left the market just after the murder, and, indeed, petitioner was arrested as a result of a second armed robbery in which his accomplice was identified by the wife of the murdered man as the accomplice in the murder (App. 15). On the basis of the evidence originally presented, the jury convicted and the Supreme Court of California affirmed. The evidence had been fully tested at trial.

The additional questions concerning the truthfulness of some of the testimony and alleged suppression of evidence were injected into the case thereafter as a result of additional testimony given at the hearing conducted by Justice White for the Supreme Court of California, which found the conviction proper. While hindsight might now suggest to a jury trying the damage claim that respondent Pachtman had acted improperly in prosecuting the case, there is little to indicate that at the time he tried the case he knowingly committed any misdeeds.

Respondent Patchman was aware, when he tried the case, that his principal witness, Costello, was a man with a prior criminal record (App. 38); in criminal cases, however, the prosecutor frequently has to use unsavory people as witnesses. If respondent Patchman had been aware that, if petitioner were convicted and his conviction were subsequently set aside because of the determination of a federal judge made in a collateral proceeding that false testimony had been knowingly or recklessly used, he might be forced to defend his good faith in a suit seeking damages of almost $3 million, one wonders whether Patchman would have proceeded with the case at all despite the strong evidence against petitioner.

The problem that a qualified immunity for prosecutors would pose is that it would require prosecutors at a later time to satisfy a jury that they acted in good faith in conducting a criminal case whose ultimate outcome was favorable to the defendant. Perhaps in most cases the prosecutor could prevail. The critical consideration in determining the proper scope



of his immunity, however, is not the prosecutor's probability of successfully defending the suit, but the inhibiting effect upon the vigorous performance of his duties that giving him only a qualified immunity for such performance inevitably would have. Like a judge, a prosecutor's "errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption" (*Pierson* v. *Ray, supra,* 386 U.S. at 554).

2. There are remedies other than damage suits that provide adequate methods for dealing with prosecutorial improprieties. As the court of appeals in the present case recognized (App. 120, n. 4), "the threat of private liability as a sanction for abuse of power is less necessary in the judicial system, which provides institutionalized systems of review to correct errors."

If the prosecutor has engaged in misconduct that has denied defendant a fair trial, those errors can be corrected by the trial judge, on appeal, or, as in the present case, in a collateral attack upon the conviction. A prosecutor who seriously oversteps the bounds of proper professional conduct may be disciplined or censured by the court, either on its own motion or as a result of disciplinary proceedings initiated by the local bar association. Finally, if the prosecutor's misconduct should constitute a crime, such as subornation of perjury, or violation of federal criminal civil rights laws, he may be criminally prosecuted therefor like anyone else who violates the law. "[T]he judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct pro-

scribed by an Act of Congress * * *'" (*O'Shea* v. *Littleton,* 414 U.S. 488, 503); in this respect it is similar to executive privilege, which "has never been applied to shield executive officers from prosecution for crime" (*Gravel* v. *United States,* 408 U.S. 606, 627).[10]

As the Court of Appeals for the District of Columbia Circuit recently stated in *Apton* v. *Wilson,* 506 F. 2d 83, 93–94:

> * * * [T]he prosecutor's absolute protection, like that of the judge from which it is derived, is both justified and bounded by the judicial traditions and procedures that limit and contain the danger of abuse. Cases holding prosecutors absolutely immune have referred to them as "quasi-judicial officers," and the circumstances typically provide alternative instruments of the judicial branch to check misconduct—the discretion of the grand jury, the procedures of a trial, and the potential sanction of discipline imposed by the court itself.

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[10] If the prosecutor has been convicted of a crime involving acts done in performance of his official duties, the reason for giving him absolute immunity for such acts no longer exists. In that circumstance, the immunity should no longer be available to shield him from damage liability for those acts.



## CONCLUSION

This Court should hold that prosecutors have absolute immunity from liability for damages for acts done in the performance of their official duties.

Respectfully submitted.

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